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NO. 25485

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
THEOTIS MYRICK, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 02-1-2169)

MEMORANDUM OPINION

(By: Lim, Acting C.J., Foley and Nakamura, JJ.)

Theotis Myrick (Myrick) appeals the November 4, 2002 judgment of the family court of the first circuit¹ that convicted him, upon jury verdicts, of two counts of violating a temporary restraining order (TRO).² On appeal, Myrick argues insufficiency of the evidence. We affirm.

I. Background.

The evidence adduced at trial may be distilled, as follows.

The complaining witness (the CW) testified that on July 10, 2002, she applied for and was granted a TRO against Myrick, her ex-boyfriend. The TRO ordered Myrick not to "contact, write, telephone or otherwise electronically contact (by recorded

¹ The Honorable Steven S. Alm, judge presiding.

² Hawaii Revised Statutes § 586-4(d) (Supp. 2003) provides in pertinent part that, "When a temporary restraining order is granted and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor."

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message, pager, etc.) the [CW], including where the [CW] lives or works."

Honolulu Police Department officer Kevin Nishimura (Officer Nishimura) testified that the TRO was served on July 13, 2002, at approximately 2:00 a.m., at the Fox & Hound Bar. Officer Nishimura recalled that another police officer read the TRO to Myrick, whereupon Myrick stated that he understood its contents. Myrick was given a copy of the TRO. Officer Nishimura also witnessed Myrick sign and date a proof of service of the TRO. According to the CW, Myrick telephoned her twice at work later that day.

The first call came at around 1:00 or 1:30 in the afternoon. The CW remembered that Myrick identified himself at the outset. She also recognized his voice. He told her, "I tried to be nice." The CW immediately hung up the phone and called the police.

Honolulu Police Department officer Mark Moncrease (Officer Moncrease) responded to the call. Officer Moncrease testified that he took a statement from the CW and left. When he returned to the CW's workplace later that afternoon, the second call came in.

The CW testified that a co-worker answered the second call and transferred it over. When the CW picked up, Myrick identified himself and said, "Yeah, I'm going to show naked pictures of you to everybody." The CW again recognized Myrick's

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voice. She signaled to Officer Moncrease that it was Myrick, and handed the phone to him.

Officer Moncrease recalled that the CW's countenance changed to a frown when she answered the second call. When she told him it was Myrick, Officer Moncrease asked her for the phone. Officer Moncrease picked up the phone and heard someone breathing. When Officer Moncrease identified himself, the caller hung up.

In his defense, Myrick offered the testimonies of Shante Williams (Williams) and Michael Tillis (Tillis). Williams, Myrick's girlfriend, testified that Myrick was with her at her apartment at the alleged times of the phone calls. According to Williams, she and Myrick awoke that day, a Saturday, "around 2:00, 3:00 in the afternoon" and "watched movies and just hung around my apartment." Williams maintained that Myrick did not use her cell phone or apartment phone that day, nor could he have used either phone without her knowledge. Williams also noticed that Myrick did not have his cell phone with him that weekend.

Tillis, who shared an apartment with Myrick at the time, testified that Myrick's cell phone was used as a house phone, and that Myrick "always leaves it at the house on the weekends so I can use it to call my parents."

Myrick also testified. He remembered he had drunk a lot at the Fox & Hound Bar and was "pretty buzzed" when police

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officers descended upon him *en masse* and made him step outside. "And the way they approached me, I was nervous and I was scared because I didn't know what was going on." Myrick claimed the police did not read the TRO to him, and forced him to sign another piece of paper, unread, under threat of arrest. He acknowledged telling Williams he had been "served with a TRO[,]" but neither of them knew what it was. Myrick did not, in any later event, read the TRO the police had given to him. The balance of Myrick's testimony essentially corroborated the testimonies of Williams and Tillis. Myrick adamantly denied calling the CW on July 13, 2002.

II. Discussion.

Myrick presents two points of error on appeal.

First, Myrick notes that, "In this case [Myrick] was convicted solely on the testimony of one witness, his ex-girlfriend." Amended Opening Brief at 4. Myrick asserts that, "All other testimony concerning what happened by any other State witness is not relevant because no other person heard [Myrick] violate the [TRO] and no other State witness is therefore competent to testify as to what, if anything at all, was communicated to [the CW] by [Myrick]." Amended Opening Brief at 4-5. Myrick thereupon concludes that, "Without any further telephonic evidence, the mere accusation of one witness contrasted with the adamant and consistent denial of guilt of a defendant cannot be said to prove guilt beyond all reasonable

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doubt." Amended Opening Brief at 5.

Second, Myrick avers that,

Other than the mere accusations of [the CW], the State of Hawaii presented absolutely zero actual evidence to the jury to disprove [Myrick's] alibi. It was plain error and an abuse of the trier of fact's discretion to find that [Myrick's] alibi had been disproved beyond all reasonable doubt. The second guessing of defense witnesses by the Deputy Prosecuting Attorney and the arguments of counsel do not equal evidence.

Amended Opening Brief at 6.

Underlying both of these points is an attack on the jury's prerogative in determining the credibility of the witnesses and the weight of the evidence. This attack must fail. "The jury, as the trier of fact, is the sole judge of the credibility of witnesses or the weight of the evidence." State v. Tamura, 63 Haw. 636, 637-38, 633 P.2d 1115, 1117 (1981) (citations omitted). Also integral to the first point is a contention that the CW's allegations alone were insufficient to convict because they were countered by Myrick's adamant denials. This, too, is incorrect. "Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the trier of fact's findings." State v. Sua, 92 Hawai'i 61, 69, 987 P.2d 959, 967 (1999) (brackets, citations and internal quotation marks and block quote format omitted).

As to both points, "The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (citation and block quote format omitted). Hence, in

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essence, both of Myrick's points of error urge that there was insufficient evidence to convict: "On appeal, the test to determine the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992) (citations omitted). See also Tamura, 63 Haw. at 637, 633 P.2d at 1117. "Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." Ildefonso, 72 Haw. at 577, 827 P.2d at 651 (citation, internal quotations marks and ellipsis omitted). The evidence adduced at trial, when viewed "in the light most favorable to the State," id. at 576, 827 P.2d at 651 (citations omitted), clearly contains substantial evidence to support Myrick's convictions. Hence, both of Myrick's points of error on appeal lack merit.

III. Conclusion.

Accordingly, the family court's November 4, 2002 judgment is affirmed.

DATED: Honolulu, Hawai'i, July 30, 2004.

On the briefs:

Michael A. Glenn,
for defendant-appellant.

Donn Fudo, Deputy Prosecuting
Attorney, City and County of Honolulu,
for plaintiff-appellee.

Acting Chief Judge

Associate Judge

Associate Judge